

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 25, 2004

Case No.: TIA-0282

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a general service operator, utility operator, auxiliary operator, and maintenance mechanic at the Savannah River Site (the site). In his application, he stated that he worked at the site for approximately 15 years -- from 1972 to 1987. He requested physician panel review of six illnesses -- restrictive pulmonary function, pleural thickening, colon polyps, prostate strictures, pleural thickening, diabetes and erectile dysfunction. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. For the restrictive pulmonary function and pleural thickening, the Panel found that he had the condition but did not find evidence of "substantial or prolonged exposures to asbestos or to agents that can cause restrictive lung disease." See Panel Report. For the colon polyps and prostate strictures, the Panel cites a lack of conventional medical knowledge linking these conditions to workplace exposures. For the diabetes, the Panel stated that this condition could be linked to pesticides, but the Panel found no evidence of pesticide exposure and

concluded that the diabetes arose from non-occupational factors. Finally, for the erectile dysfunction, the Panel determined that the main causative factors were the Applicant's diabetes, medications, depression, and post traumatic stress disorder. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant argues that the Panel did not thoroughly review his record. He claims that toxic exposures at the site are the only possible cause of his illnesses. Finally, the Applicant states that the record does not properly document all the buildings where he worked at the site.

In response to the appeal, we requested that OWA submit a copy of the record in this case. The OWA has not submitted a copy, and we understand that attempts to locate the record have been unsuccessful.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

We are unable to evaluate the Applicant's appeal. As stated above, the OWA record was not submitted. Accordingly, further consideration of this appeal at DOL is in order. We note that the Applicant may wish to consider whether he has additional information concerning asbestos exposure. The Panel found that the Applicant had pleural thickening, but stated that the record did not contain evidence of significant and prolonged exposure to asbestos. Although we did not have a record to review in this case, we did review the site profile, which indicates the presence of asbestos in the areas where the Applicant claims to have worked. If the Applicant believes that there is more information to submit regarding asbestos exposure, he should raise the issue with the DOL.

As the foregoing indicates, given our inability to obtain the OWA record, we have concluded that further consideration of the Applicant's appeal arguments is warranted and, therefore, the appeal should be granted.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0282 be, and hereby is, granted.
- (2) The OWA record was not submitted. Further consideration of the Applicant's appeal arguments is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2005